

When bona fides matters: ex turpi and borrower claims

Scullion v Bank of Scotland plc (t/a Colleys)

Tamsin Hyland considers the scope for raising ex turpi causa in "defence" to claims by borrowers.

The indemnity PI market has been awash with claims against valuers and solicitors arising out of the property crash. Authorities stemming from the last round of lender litigation will not necessarily determine claims outcomes this time and therefore judgments handed down in the current round are of great interest – not least for any indication of a more or less sympathetic Court.

Of particular note are the judgments in *Scullion v Bank of Scotland plc (t/a Colleys)* [2010] EWHC 572 (Ch) and [2011]. Mr Scullion applied for a buy-to-let mortgage with the defendant bank and ultimately claimed to have suffered a loss on the basis that the bank's valuer had negligently overvalued the Property. Focus was rightly directed to the question of the scope of a valuer's duty of care to a borrower where the loan was for a buy-to-let investment. However, the case is also a useful example of the use of 'illegality', effectively as a "defence" to the borrower's claim.

In *Scullion*, part of the Bank's response to the claim was to assert that to allow Mr Scullion to recover damages would be contrary to public policy in circumstances where it was alleged that Mr Scullion had overstated the purchase price of the property in his application (to secure a larger mortgage than the bank's lending criteria would otherwise have allowed).

Illegality / ex turpi causa

In short, illegality involves the application of public policy to bar a claimant from recovering damages where his cause of action is founded upon an illegal act.

The leading authority on the application of the doctrine in contractual disputes is the case of *Moore Stephens v Stone Rolls Ltd* [2009] UKHL 39, in which it was held that where a claimant needs to rely on his own illegal act to plead his case, his claim ought to be barred as a matter of public policy. In tort, however, the position has been rather more nebulous, requiring personal fault by the claimant; conduct commensurate with "moral turpitude," and crucially, a sufficient nexus between the claimant's moral turpitude and the facts of the claim (*Lexi Holdings Plc v DTZ Debenham* [2010]).

A detailed and helpful analysis of the application of ex turpi causa to claims by borrowers was given by Richard Snowden QC in *Scullion*. Although on the facts it was held that the borrower had not in fact acted dishonestly, Richard Snowden QC considered that false declarations made in a mortgage applications would be "inextricably linked" to a borrower's claim, such that public policy could be invoked.

Practice points:

1. It seems that a court will not readily find against a lay borrower especially if heavily influenced or 'led' by professional advisors. However, that might not be the case where it can be established that a borrower actively misled the lender and/or must have known that the lender was operating under a misrepresentation and did nothing to correct it.
2. Since the behaviour of the defendant is technically irrelevant to the application of illegality, the relative culpability of the parties for the loss arising will not be a factor, even where a solicitor has been grossly negligent.
3. Where there is also a concurrent claim by the borrower's lender, the availability of a potential bar to the borrower's action (principally for the balance of the purchase price net of the advance) justifies investigations of the borrower claimant at the outset.

4. Consider critically the availability of documentary evidence to support such a plea. For example:
 - A contract of sale signed by the borrower which misstated the purchase price;
 - A false declaration on the mortgage application or document on the conveyancer's file as to the source of the balance of the purchase price;
 - A completion statement provided to the borrower noting the purchase price and balance required to complete;
 - A borrower's failure to provide a cogent explanation within the protocol or to respond properly or at all to requests for confirmation of the source of the deposit and/or allegations of dishonesty.
5. Without prejudice negotiations provide a good opportunity to meet the borrower to assess and test their evidence. Much may depend on the performance of witnesses at trial by which time the stakes are much higher.
6. In the context of no-money-down schemes it is easy to find a contemporary resonance in the judgment in *Beresford v Royal Insurance Ltd* (1938), where it was held that "if a person starts with nothing and never legitimately acquires anything he cannot realistically be said to have suffered any loss."
7. Where 'illegality' is difficult to raise, the bona fides of a borrower is still relevant to causation. A borrower with financially driven motives is less likely, even with correct advice, to have acted any differently.

It remains to be seen just how willing the Courts will be to apply public policy considerations to a growing number of borrower claims, which might be tainted by some level of misrepresentation during the loan application and purchase process. However, given the various schemes adopted by borrowers to acquire properties, some on a no-questions basis, others where the borrower might have been asked to turn a blind eye, there is every reason for defendants to consider this an important part of any defence and at the very least damaging to the borrowers' credibility and therefore their enthusiasm to pursue formal proceedings.

If you would like to discuss any of the issues raised in this article please contact Tamsin Hyland on 01865 781185 or by emailing tamsin.hyland@henmansllp.co.uk.



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